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IN THE

Supreme Court of the United States

October Term, 1966

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND ITS LOCAL UNION 2958,

Petitioners,

v.

UNITED STATES OF AMERICA
AND
UNION CARBIDE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 23, 1966.

Petitioners request that this petition be accorded expedited consideration, and that if certiorari is granted, review on the merits be accorded like expedition. To that end, we have structured this petition to serve as our brief on the merits as well, and waive the right to file a separate brief on the merits.

The petition seeks review of the issuance of a national emergency injunction, enjoining for 80 days the continuation of a strike at the Kokomo, Indiana plant of Union Car-

bide Corporation, and requiring the employees to return to work at the old terms and conditions of employment. Unless reversed by this Court, the injunction will remain in effect for 80 days, i.e. until March 13, 1967, and will then automatically expire. 29 U.S.C. § 180. Expedition is warranted for two reasons:

1. If we are correct that the injunction was improperly issued, it is inflicting a grievious injury upon the 2100 employees, who, after striking for 85 days for higher wages, have been required to return to work at the old wages without resolution of their dispute. Every day the injunction continues compounds that injury. If it is to be reversed, it is obviously essential that reversal come at the earliest possible time.

2. The automatic expiration of the injunction on March 13, 1967 would moot this case unless it is decided prior thereto. This Court, therefore, can never review any important legal questions regarding the national emergency provisions except upon an expedited schedule.

OPINIONS BELOW

The opinion of the district court, which is unreported, is reproduced in the Appendix to this petition. The opinion of the Court of Appeals, which is not yet reported, is reproduced in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1966, and is reproduced in the Appendix to this petition. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1) and 29 U.S.C. § 178(c).

QUESTIONS PRESENTED

1. Whether Sections 206-210 of the Labor Management Relations Act, 29 U.S.C. §§ 176-180, the "national emergency" provisions, are applicable to a strike at a single plant which is not a substantial part of an industry.

2. Whether, when the Government acknowledges that the struck plant does not constitute a substantial part of an industry, the requirement of Section 208(a)(i) that, to be enjoinable, the strike must be one which "affects an entire industry or a substantial part thereof" is met by a showing that a product of the struck plant is purchased by a substantial part of another industry.

3. Whether the "industry" to be affected must be a *bona fide* industry, as distinguished from a subgroup of, or product classification within, an industry. Specifically, whether, within the meaning of Section 208(a)(i), there is a "military aircraft engine industry", or whether the "industry" is aircraft engines and engine parts, including both military and civilian.

4. Whether "entire industry or a substantial part thereof" means a substantial proportion of an entire industry (as alleged by petitioners), or any production which, regardless how large or small a proportion of the entire industry, "rests upon a resource commitment of a very substantial nature indeed" (as held by the Court below).

5. Whether, when the Government elects to introduce no evidence to prove what part of the industry is affected, the Court may conclude, from its "common knowledge" of the magnitude of the war effort, that the strike affects a "substantial part" of an industry.

STATUTORY PROVISIONS INVOLVED

Sections 206-210 of the Labor-Management Relations Act of 1947 as amended, 29 U.S.C. §§ 176-180, 61 Stat. 155, provide in pertinent part as follows:

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out:

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code

and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in [28 U.S.C. § 1254].

Sec. 209 (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever

happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

STATEMENT OF THE CASE

This action was brought by the United States pursuant to Sections 206-210 of the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 176-180, the so-called "national emergency" provisions. Those provisions authorize the enjoining of a strike which "affects an entire industry or a substantial part thereof" and "imperils the national health or safety" (Section 208(a) of the Act, 29 U.S.C. § 178(a)). The United States asserted that a strike by petitioners at the Kokomo, Indiana plant of Union Carbide Corporation (hereinafter the Company) was enjoinable under these provisions. The case presents important questions as to the meaning of Section 208(a)(i), which provides that a strike, to be enjoinable, must affect "an entire industry or a substantial part thereof."

Facts Preceding the Institution of Suit

On September 29, 1966, the 2100 employees of the Kokomo plant of Union Carbide Corporation struck for higher wages. There is no dispute that the strike was entirely lawful.

On December 19, 1966, after the strike had been in progress for 81 days, the President signed an Executive Order invoking the Taft-Hartley national emergency procedures, and appointing a Board of Inquiry to investigate the dispute.

The order stated the President's "opinion" that the strike at the Kokomo plant affected "a substantial part of the military aircraft engine industry," and that, if permitted to continue, it would "imperil the national safety." (R. 21-22)

The Board of Inquiry held hearings on December 20, 1966, and made its report to the President that evening. Pursuant to its limited statutory responsibilities (Section 206, 29 U.S.C. § 176), the Board reported only on the issues involved in the labor dispute. It did not take evidence, or report, on whether the strike affected an entire industry or a substantial part of an industry, nor on whether the strike imperiled the national health or safety. (R. 35-42)

Upon receipt of the Board's report, the President directed the Attorney General to institute this action for an injunction against the continuation of the strike at the Kokomo plant. (R. 14-15)

Proceedings in the District Court

The complaint alleged that the strike affected a "substantial part of the military aircraft engine industry," and that, if permitted to continue, it would imperil the national safety. The parties stipulated that the case would be tried on affidavits. (R. 5-6, 23)

On the issue of peril to the national safety, the Government submitted two affidavits, one by Deputy Secretary of Defense, Cyrus Vance, and the other by Air Force Major General Harry E. Goldsworthy. The Vance affidavit stated that the Kokomo plant produced a particular type of metal alloy, not elsewhere obtainable, which was sold to General Electric Company for use in the manufacture of aircraft engines for three denominated fighter planes—the F-4, RF-4 and F-104; and that, in addition, the Kokomo plant produced particular types of "blade castings," "blades" and "vanes," not elsewhere obtainable, which were sold to General Electric Company and Avco Corporation for use in the manufacture of engines for five denominated military heli-

copters, the CH-53, CH-46, SH3D, UH-1 and CH-47. Without these materials, the Vance and Goldsworthy affidavits asserted, the production of these particular engines would be delayed, to the detriment of the war effort and, consequently, the national safety. In reply, petitioners submitted the affidavit of Dr. Charles Mantell, a noted metallurgist, who stated that there were other alloys available, from other manufacturers, which could be used in certain of the denominated engines in place of the alloy manufactured in the Kokomo plant. (R. 16-19, 137-140, 131-133)

With respect to the other statutory prerequisite to injunction—that the strike "affects an entire industry or a substantial part thereof"—the Government's affidavits were virtually silent. The Vance affidavit merely reiterated the language of the statute:

> "8. The existing work stoppage at the Stellite Division of Union Carbide Corporation, Kokomo, Indiana, which has been in effect since September 30, 1966, affects a substantial part of the military aircraft engine industry of the United States, an industry which is engaged in trade, commerce, transportation, transmission and communication among the several states and with foreign nations and in the production of goods for commerce . . ." (R. 19)

A second affidavit, of Mr. Paul McGann, attached a table showing total industry shipments of "aircraft engines and parts," and subtotals of shipments to various categories of customers. (R. 134-136)

On the "industry" issue, petitioners submitted affidavits of Wise Stone, Associate Director of the Aerospace Division, United Automobile Workers, and Woodrow Ginsburg, Research Director of the Industrial Union Department, AFL-CIO. The Stone affidavit averred that there is no separate "military aircraft engine industry"; that the same basic engines are manufactured in both military and civilian versions; that military and civilian engines are manufactured

by the same companies, in the same plants, using the same employees; and that, indeed, the very engines affected by the Kokomo strike are made in both military and civilian versions. The Ginsburg affidavit stated that the Government's own industrial classification system identifies the industry as "aircraft engines and engine parts," including both military and civilian. The Stone affidavit concluded that, even if there *were* a "military aircraft engine industry," the engines affected by the strike constitute only "a small proportion of the total production of military aircraft engines." (R. 48-54, 84-89)

The District Court concluded that the Government was entitled to an injunction. The court had "no difficulty with the second question presented—that is affecting the safety of the country—in view of the evidence submitted." With respect to the first question—whether the strike affected "an entire industry or a substantial part thereof"—the court concluded that "the strike at the Kokomo plant does have *a substantial effect on* the industry of production of military aircraft engines and therefore is encompassed within the Act." (Emphasis supplied). (App. 37-38)

The injunction signed by the District Court on the evening of December 21, 1966 ordered the employees at the Kokomo plant to return to work under the terms and conditions which had been in effect prior to the strike. At petitioners' request, the District Court stayed its injunction until noon of the following day, to permit an appeal to the Court of Appeals. (R. 152-154, 155)

Proceedings in the Court of Appeals

On the morning of December 22, 1966, the parties appeared before a panel of the Court of Appeals. The court heard argument on the merits at that time, and entered an order further staying the injunction until 5 p.m. the following day, to permit it to decide the case on the merits. (R. 200)

On December 23, 1966, the Court of Appeals affirmed. Its opinion noted that petitioners were not challenging the finding as to the second prerequisite—peril to national safety—but only as to the first—whether the strike "affects an entire industry or a substantial part thereof." (App. 41-42)

Petitioners had advanced three contentions on this point. First, petitioners contended that Section 208(a)(i) requires that the strike affect the entire industry or a substantial part of the industry *in which the strike is occurring*—here the metal alloys industry—and that the statute is not met by showing that the strike indirectly affects another industry which purchases the struck product. The Court of Appeals rejected this contention, stating that "it is disposed of to our satisfaction by *United States* v. *United Steelworkers (American Locomotive Company)*, 202 F.2d 132 (2d Cir. 1953), *cert. denied before judgment*, 344 U. S. 915." (App. 42)

Second, petitioners contended that, even assuming effect on a customer industry can be considered, the only "industry" alleged by the Government to be affected—the "military aircraft engine industry"—is not an "industry," but only a subgroup of, or product classification within, the aircraft engine and engine parts industry. The court rejected this argument on the ground that the record evidence, "especially when read with the common sense which should inform the judicial process as any other," demonstrated that extensive resources are devoted "to the building of aircraft engines designed for use in military aircraft." The petitioners' statistics showing that military engines are a small portion of the entire aircraft engine and engine parts industry "impressed" the court "as supporting a discernible division between military and civilian production." (App. 42-43 and n. 1)

Finally, petitioners contended that even if there were a "military aircraft engine industry," the Government had introduced no evidence whatsoever to show that the strike

affected "a substantial part thereof." Petitioners pointed out that, while the Government identified certain engines which were affected by the strike, it introduced no evidence regarding the volume of production of those engines, nor of the dimensions of the entire "military aircraft engine industry" from which a court could determine whether the affected engines constituted a "substantial part" of the "industry." The court below acknowledged that "this record arguably does not admit of an identification in concrete terms of the total resources of this country employed in the manufacture of military aircraft engines." It concluded, however, from "common knowledge," that the production of the particular engines affected required "a resource commitment of a very substantial nature," and that the entire industry "is great, but it is not unlimited." These assumptions, unsupported by any factual data in the record, sufficed, it concluded, to satisfy the statutory requirement that the strike "affects an entire industry or a substantial part thereof." The court's full opinion on this point was as follows:

> "In respect of the second branch of the inquiry, the statute does not embody an all-or-nothing approach. The District Court did not have to find that the "entire" military aircraft engine industry was affected, but only that a significant segment of it was. This record arguably does not admit of an identification in concrete terms of the total resources of this country employed in the manufacture of military aircraft engines. But, in the light of what is common knowledge of the magnitude of the effort this nation is being called upon to make in Southeast Asia it is impossible to read what is in this record of the types and functions of the aircraft involved without concluding that their availability in adequate numbers to every branch of the armed services rests upon a resource commitment of a very substantial nature indeed. Our industrial might—in air-

craft engine manufacture as elsewhere—is great, but it is not unlimited. We would overestimate it sadly if we were to conclude, on this record, that an effort of very substantial proportions is not required of the military engine aircraft industry to keep these planes and helicopters moving steadily to the area of critical need." (App. 43-44)

The injunction went into effect at 5 p.m., December 23, 1966, and the employees at the Kokomo plant who have been recalled have returned to their jobs. Unless reversed by this Court, the injunction will continue in effect for 80 days, i.e., until March 13, 1967, at which time it will automatically expire. Section 210 of the Act, 29 U.S.C. § 180.

REASONS FOR GRANTING THE WRIT

This case presents important questions which have not been, but should be, decided by this Court.

1. This Court has dealt with the "national emergency" injunction provisions only once, in *United Steelworkers* v. *United States (Steel Industry)*, 361 U. S. 39 (1959). In that opinion, the Court recognized that there are two separate statutory prerequisites, each of which must be found by the court "upon the evidence adduced" before an injunction can be issued, 361 U. S. at 41. The courts must find first, that the strike affects an entire industry or substantial part thereof, and second, that it imperils the national health or safety.[1]

[1] The *per curiam* opinion of the Court states that "the statute imposes upon the courts the duty of finding whether a strike or lockout meets the statutory conditions of breadth of involvement *and* peril to the national health or safety." 361 U.S. at 41 (emphasis added). In their concurring opinion, Justices Frankfurter and Harlan emphasized that "§208 states two separate criteria, both of which must be satisfied before an injunction may issue against a strike, and it states no other relationship between them than that both must proceed from 'such strike'." 361 U.S. at 51.

Justice Douglas, in his dissenting opinion, also recognized the separateness of the two requirements. He stated that the "first requirement of the Act" that the strike affects a substantial portion of an industry

In *Steel Industry,* the Court discussed at length the second of these requirements—peril to the national health or safety. It did not, however, deal with the first—when a strike "affects an entire industry or substantial part thereof"—because the existence of that factor was not in dispute. The strike involved 500,000 employees and had closed 85% of the nation's steel mills. 361 U. S. at 63.

The instant case presents important questions of statutory construction relating to the first prerequisite—the "industry" standard. As we will show, Congress intended the "national emergency" provisions to be applicable only to industry-wide strikes, which shut down all or a substantial part of the struck industry. It was for this reason that the "industry" standard was inserted in the statute, as a requirement which must be satisfied in addition to the "national health or safety" requirement.

Congress did *not* intend that these provisions apply to a single-plant strike which cuts off a particular product needed by the defense establishment. Indeed, during the Korean War, when problems of this sort began to occur, the Senate Committee on Labor and Public Welfare considered whether the national emergency provisions were available to meet this situation. It concluded that they were not:

> "It is well to note that the scope of the emergency strike must affect 'an entire industry or a substantial part thereof', in order to qualify for the series of procedures set forth in this section of the Taft-Hartley law.
>
> "The emergency disputes provisions of the Taft-Hartley law were not designed to meet problems of the sort developing in a defense economy. Specifically, this means that it is entirely possible that a small-parts

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"is satisfied," but then concluded that on the record the second requirement—peril to the national health or safety—had not been adequately established. 361 U.S. at 69-70.

manufacturer making a part important to the defense effort can be involved in a dispute and not qualify under the Taft-Hartley law as a dispute affecting 'an entire industry or a substantial part thereof'."[2]

In the hearings leading to this report, Senator Taft made the same point with reference to a hypothetical situation almost prophetically similar to the present case:

"DR. LEISERSON. Now, as I was saying about the dispute matter, . . . a lot of the disputes that the President might have to refer to this Wage Stabilization Board under the present regulations might really be a little bit of a dispute. I remember in the last war there was a dispute in one comparatively small company in Michigan. But they made a part that went into every airplane. Well, it was very vital.

"SENATOR HUMPHREY. Now, in the instance of, let us say, the small company that you mentioned a moment ago, do you visualize that the emergency provisions of the Taft-Hartley Act would apply to such a small company?

"DR. LEISERSON. I don't know . . . .

"SENATOR TAFT. Of course, it never was intended to deal with this kind of a situation. It was intended to deal with a nation-wide strike in normal peacetimes, and only national strikes substantially. So I think it must be admitted that it is not suited or is not intended to apply to this kind of a situation.

"SENATOR HUMPHREY. It was for a different kind of economic picture than we have, and it was not intended for a mobilization situation as such. . . .

"SENATOR TAFT. Well, the Taft-Hartley provisions as they apply to a wartime emergency situation

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[2] Senate Report No. 1037, 82nd Cong. 1st Sess., pp. 3-4

> are not satisfactory, certainly not to me, and nobody seems to know what is the best method of handling these emergency situations. But here you have a question which may extend to very small plants that have a direct effect on the mobilization of industry, that were never intended to be covered by the Taft-Hartley Act."[3]

Shortly thereafter, legislation was introduced to make the national emergency provisions of Taft-Hartley applicable to strikes in a "vital industry or plant" which endanger the national security. S.2999, 82nd Cong., 2d Sess., 1952. At the hearing on this bill, Professor Nathan Feinsinger, then Chairman of the Wage Stabilization Board, discussed the inadequacy of the existing law, using as his specific example a strike at a *single plant manufacturing jet engines*:

> "When collective bargaining, mediation and conciliation have failed, there is, generally speaking, no further means of preventing a strike or other interruption of production except through the process of a national emergency injunction obtained pursuant to Title II of the Taft-Hartley Act. Such injunctions, however, are available only when the dispute or strike would 'imperil the national health or safety' and involves 'an entire industry or substantial part thereof'.
>
> As Senator Taft himself has pointed out, the injunction is reserved for national strikes. It would not be available in most of the disputes with which the [Wage Stabilization] Board is dealing. *Such disputes, for example, may include a single jet engine plant, which, while vital in terms of defense effort, may be only a*

[3] Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong., 1st Sess., on Wage Stabilization and Disputes Program (1951), p. 19.

small segment of the industry. Therefore, the injunction provisions of the Taft-Hartley Act could not be invoked."[4]

The Senate Committee on Labor and Public Welfare, in its report recommending the bill, stated:

> "Section 206 of the present Taft-Hartley Act applies to strikes and lock-outs 'affecting an entire industry or a substantial part thereof' so as to 'imperil the national health and safety'. This new section would permit application of the new procedures *to a unit smaller than a 'substantial part' of an industry.* This would meet the potential need of insuring production in *one or a few plants producing critical items.*" (Emphasis added.) S. Rep. No. 2073, 82nd Cong., 2d Sess., 1952.

This bill failed to pass.[5] Yet in subsequent years, the Government, with the acquiescence of the lower courts, has mis-

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[4] Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong. 2d Sess. on the National Emergency Labor Disputes Act (S. Bill No. 2999) (1952), at p. 33; emphasis added.

[5] Coincidentally, eleven days after the decision below, Senator Fannin reiterated the Congressional view that the statute is not applicable to single plant strikes. See Press Release, Senator Paul Fannin, January 3, 1967 (quoted in BNA, Daily Labor Report, January 3, 1967, at pp. A7-A8). The release describes a speech delivered by Senator Fannin urging that the national emergency provisions be amended to make injunctions permanent, rather than of only 80 days duration. It continues:

> "To counteract expected charges that his proposal would harm unions, Fannin said that *unions would retain the right to strike a particular plant or even a segment of an industry.* 'The open-end injunction would be enforced only if the strike were industry-wide, and then only if it jeopardized national health and welfare', he said." (Emphasis added).

used the statute to reach these very situations.[6] The lower courts' acquiescence is not entirely surprising. Most of the national emergency injunction actions have been uncontested. The Government, based on its allegation of peril to the national safety, has secured temporary restraining orders breaking the strikes, and there were no subsequent hearings. The only two cases in which the "industry" issue has been actually litigated are *American Locomotive, supra,* and the instant case.

These cases contradict the express intent of Congress. But, more, they have effectively written the "industry" requirement out of the statute, and they have trespassed on the right to strike—a right which Congress has been most solicitous to protect[7]—in areas where Congress has expressly determined the right should not be abridged.

2. The harm inflicted by these erroneous decisions is compounded, because the time limitations built into the statute —particularly the automatic expiration of the injunction after 80 days (§ 210, 29 U.S.C. § 180)—have conspired to make review by this Court almost impossible. In the usual course, review through the Court of Appeals and this Court could not be obtained within 80 days and the case is mooted by the expiration of the injunction.[8]

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[6] In addition to the instant case, see, e.g., *United Steelworkers v. United States (American Locomotive Co.)* 202 F.2d 132 (2d. Cir. 1953); *United States v. International Association of Machinists (Republic Aviation Co.)* (E.D.N.Y. Civil No. 62-C-662, unreported, 1962); *United States v. General Electric Co.*: (S.D. Ohio, Civil No. 3350, 1966, unreported).

[7] See e.g., Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104, and Section 13 of the National Labor Relations Act, 29 U.S.C. §163.

[8] In the one prior case in which a union sought to challenge abuse of the "industry" standard, *United Steelworkers v. United States (American Locomotive),* 202 F.2d 132 (2d Cir. 1953), the Court of Appeals' decision did not issue until the 77th day in the life of the injunction. In desperation, the union had petitioned for certiorari prior to the Court of Appeals' judgment, but certiorari was denied, 344 U.S. 915 (1953).

The present case, like *Steel Industry,* has arrived here in time only because the injunction was stayed, and the 80 days did not begin to run until *after* the Court of Appeals' decision was rendered. This case thus presents a unique opportunity for review of the emasculation of the "industry" requirement. If review is not granted now, this Court may never get another chance to review the developing body of decisional law in the lower courts supporting the application of the Act to single-plant strikes.

3. The emasculation of the "industry" standard has resulted from three dubious interpretative devices, all of which were employed by the Government in this case. Because this petition will also serve as our brief on the merits, should certiorari be granted, we discuss these issues of interpretation at somewhat greater length than normally we would in a petition for certiorari, at pp. 21-36 herein.

In a broader sense, however, the importance of this case transcends the need to correct the particular erroneous interpretations advanced by the Government and adopted by the Court below. The fundamental concern here, as in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 577 (1952), is whether a threat to the national safety or health entitles the executive branch to proceed without authority from, or contrary to limitations imposed by, the legislative branch. In *Youngstown,* despite evidence that a steel strike would cripple the Nation's conduct of the Korean War effort, this Court held that the President could not exceed the powers conferred upon him by Congress in securing continued defense production.

Here, the Government has not seriously attempted to prove compliance with the "industry" limitation. Indeed, it introduced virtually no evidence to support a judicial finding that the strike at the Kokomo plant "affects an entire industry or a substantial part thereof." Instead, it has sought, by invocation of the spectre of peril to the national

safety, to panic the lower courts into ignoring the "industry" requirement.

The Government's effort to persuade the courts below to ignore the "industry" requirement is apparent from the brief it submitted to them.[9] The argument portion of the Government's brief began as follows:

> "In the long period of post-war international tension, it is not surprising that the President, in his concern for the Nation's well-being, should invoke the provisions of the Act when a work stoppage occurs, or is threatened, which, in his judgment, imperils the safety or health of the Nation. Nor is it surprising that the courts, equally impressed with the need to guard our health and safety, should grant the injunctions requested. Thus, since the enactment of the Act in 1947, the Government has on many occasions asked for and received the aid of the courts in these circumstances." (R. 28)

The conclusion of the Government's brief likewise invited the courts below to ignore the "industry" question:

> "When, as in this case, the evidence presented to the Court so clearly establishes that the Nation's safety is threatened and that there are threats of irreparable injury to the Nation for which legal remedies would be inadequate, a preliminary injunction, as prescribed by Rule 65 of the Federal Rules of Civil Procedure, should issue to enjoin the strike." (R. 33)

Nor was enlightenment shed in the body of the brief. The only legal discussion[10] of the "industry" requirement suggested that it should be ignored:

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[9] Memorandum of Points and Authorities in support of Plaintiff's Motion for Preliminary Injunction. The parties rested in the Court of Appeals on the briefs they had filed in the District Court.

[10] There were two other references to the "industry" requirement in the brief. One was the statement that "The President by Executive Order *found* that this threatened strike affects a substantial part of industries engaged in trade or commerce among the several states and

"3. The strike to be enjoined need not be industry-wide if, in fact, it imperils the national health or safety." (R. 29)

Contrary to the Government's efforts, however, the "industry" requirement *does* exist in the statute as a specific limitation on the power to enjoin strikes, and Congress, though it considered broadening the statute to include single-plant strikes, did not do so.

There are, of course, other statutory powers available to the President to secure the material manufactured at the Kokomo plant. Section 18 of the Selective Service Act of 1948, 50 U.S.C. App. § 468[11]; Defense Production Act, 50 U.S.C., App. § 2071. The issue in this case is whether the President may, even though he possesses such powers, assert instead a power which Congress has not authorized. We submit that he may not.

4. The decision below constitutes a threat to the Congressionally protected right to strike. In adopting the national emergency provisions, Congress carved out a carefully limited exception to Norris-LaGuardia's prohibition against federal court injunctions of strikes. Cf. Section 208(b) of the Act, 29 U.S.C. § 178(b) with Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104. If we are correct that the injunction in this case transgressed the Congressional limita-

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that it will imperil the national safety." (R. 33) (Emphasis supplied.) The President did *not* so find, however. He merely stated his "opinion" in the Executive Order. As this Court made clear in *Steel Industry*, the finding must be made by the Court "upon the evidence adduced." 361 U. S. at 41. At one other point, the brief recites the statutory language with the general statement that, once it is met, "The Court is required to issue the injunction." (R. 30)

[11] Under the Selective Service Act, the Government has the right to take possession of a plant to secure a needed defense product, where the Company fails to deliver the product. This power has been frequently used. See Appendix II to Mr. Justice Frankfurter's concurring opinion in *Youngstown, supra* 343 U. S. at 620-628.

tion, the injury to the employees in the Kokomo plant is apparent.

These employees ceased work, and sacrificed their wages, for a period of 85 days, in an effort to require the Company to pay them higher wages. In so doing, they were exercising, at great personal cost and hardship, the only economic weapon they possess to secure their desired terms and conditions of employment. The issuance of the injunction below deprives them of that weapon; but more, it has rendered the 85 days of lost wages—which had not yet culminated in a resolution of the wage dispute—totally wasted. The Company is now in the enviable position of having the strike broken, and of securing 80 days of employment from its employees at the *old* wages—wages at which the employees, by their strike, had demonstrated they were unwilling to work. While this is, of course, the consequence of every Taft-Hartley injunction, the injury is particularly grievous if, as we have contended, the injunction was erroneously issued. That injury would, to some extent, at least, be lessened if this Court granted review, and terminated the injunction short of the full 80-day period.

5. As we have earlier indicated, the emasculation of the "industry" requirement has resulted from a series of dubious interpretations of Section 208(a)(i), all of which were advanced by the Government in this case and adopted by the courts below. We now discuss these in greater detail.

First, the Government has contended in several cases that the "industry" affected need not be the struck industry. In this case, for example, the struck plant manufactured metal alloys. However, as the court below recognized, the Government does not contend that the strike at the Kokomo plant affects the "entire metal alloy industry" or a "substantial part" thereof. (App. 42) Indeed, this Company alone has a great many metal alloy plants, so that it is unlikely that the strike in Kokomo affects a substantial part of even this one Company's metal alloy production, let alone of the

entire metal alloys industry. Instead, the Government contends that the strike affects a substantial part of *another* industry—the military aircraft engine industry—which purchases a particular alloy manufactured in the Kokomo plant. This interpretation of the statute, looking to the "customer" industry rather than the "struck" industry, has also been adopted by the Second Circuit. *American Locomotive, supra, n. 6.*

The legislative history makes clear, however, that the Congress which enacted this statute was not seeking to enjoin strikes which indirectly affect customer industries. Rather, it was concerned solely with problems caused by industry-wide strikes, i.e. strikes which shut down the "entire", or a "substantial part" of, the struck industry. Extending the federal labor legislation, by interpretation, to abridge the traditional rights of employees in areas outside the Congressional concern is a practice which this Court has repeatedly condemned. *NLRB* v. *Fruit & Vegetable Packers,* 377 U. S. 58, 62-63 (1964); *NLRB* v. *Drivers Local Union,* 362 U. S. 274, 284 (1960). Accordingly, the issuance of injunctions against strikes which do not affect a substantial part of the struck industry is a development which should be reviewed by this Court.

That the Congressional concern was indeed limited to strikes affecting a substantial part of the *struck* industry is manifest from the legislative history. At the time that Taft-Hartley Act was adopted, the nation had just experienced a national coal strike and a national telephone strike. It was this experience which prompted Congress to adopt the national emergency provisions.

> "Under the urgency of telephone and coal strikes in the winter of 1946, Congress addressed itself to the problems raised by 'national emergency' strikes and lockouts." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 598-99 (1952) (concurring opinion of Justice Frankfurter).

President Truman, in his 1947 State of the Union Message,

> "called to the attention of Congress the pressing need to create 'an adequate system of effective machinery' to replace what had been done 'by the use of extraordinary war powers' to deal with '*the special and unique problem of Nation-wide strikes* in vital industries affecting the public interest' ". *United States* v. *National Marine Engineers Ass'n.*, 294 F.2d 385 (2d Cir. 1961) (emphasis added).

The Hartley Bill, which was passed by the House, dealt with the problem of industry-wide strikes by effectively outlawing industry-wide bargaining. H.R. 3020, 80th Cong., 1st Sess., Sections 9(f)(1), 12(3)(A) and 2(16).[12] That these provisions were indeed directed solely at the "evil" of industry-wide strikes was made clear by the report of the House Committee:

> "Probably the most important clause of section 9(f) is that which limits industry-wide bargaining and which, with sections 2(16) and 12(3)(A), dealing with monopolistic strikes, is designed to put an end to strikes, such as we have experienced particularly in the coal and steel industries, in which powerful and nation-wide unions have brought the compelling pressure of strikes to bear more upon the Government and the public than upon the employers involved." (1 Leg, Hist. 326).

After the Hartley Bill, H.R. 3020, passed the House, on April 17, 1947, the Senate took up consideration of the Taft Bill, S. 1126. The emergency provisions of that bill, both as

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[12] Reprinted in 1 Leg. Hist. 187. The citation "Leg. Hist." refers to the compilation entitled *Legislative History of the Labor Management and Relations Act, 1947*, published in 1948 by the National Labor Relations Board.

reported out by the Senate Committee and as it passed the Senate, were much the same as those in the final Act, except as hereafter noted.

The entire history of this provision in the Senate makes it clear that Congress intended to cover, in Sections 206-210, precisely the same problem as was covered by the House in its prohibition against industry-wide bargaining, i.e., the industry-wide strike.

Thus the Majority Report of the Senate Committee declared:

> "Section 206 authorizes the Attorney General whenever he deems a threatened or actual strike or lock-out of such magnitude that the national health or safety is imperiled, to appoint a Special Board of Inquiry to make a public report to him."[13]

The debates on the floor of the Senate likewise make clear the Congressional intention that the national emergency provisions have application only to large scale strikes. Senator Taft, the author of these provisions, told the Senate that they provided "that if mediation is not successful and a strike occurs in a nation-wide industry, an injunction may be obtained. . . ."[14] He went on to say:

> "We could have handled the question of nation-wide bargaining as the House handled it, as an entirely separate matter, making it a conspiracy under the Sherman Act to enter into nation-wide bargaining. . . . Insofar as we propose to deal with it in title II, it is proposed to put it in the Wagner Act provision."

Senator Smith, likewise a member of the Labor Committee, described the national emergency provisions to the Senate as follows:

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[13] Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., p. 29; 1 Leg. Hist. 435.

[14] 93 Cong. Rec. 4262; 2 Leg. Hist. 1133.

> "Furthermore in title II of the bill we provide for the extreme cases which threaten national paralysis. *To meet an industry-wide stoppage* of some kind which may cause injury to the health or safety of 140,000,000 people, such as a transportation strike, or a coal strike, we have set up special machinery which will enable the Attorney General, on his own initiative, to petition the courts to prevent either a shut-down or a walk-out, until the mediation processes have had time to function."[15]

In a speech which he had printed in the Record, Senator Ball, also a member of the Labor Committee, gave the following description of the scope of the national emergency provisions sections of the Act:

> "This is the only provision in the Senate bill dealing with industry-wide bargaining and strikes, which all agree is one of our major problems. The Senate rejected an amendment to give local unions autonomy and stop internationals from dictating the terms of collective bargaining agreements on the grounds further study was needed. *As it is, the 80-day mediation period applies only to industry-wide strikes and unions can avoid its application completely by bargaining on a local or community basis.*"[16]

"Bargaining on a local or community basis" is exactly what the union has done here.

During the Senate debate, Senator Ball expressed his continued preference for the House method of seeking to prevent industry-wide strikes by restricting industry-wide bargaining, over the Senate method of dealing with the subject directly. Thus he declared:

> "The Senator from New Mexico [Mr. Hatch] said that he did not think this bill contained any provision

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[15] 93 Cong. Rec., 4281; 2 Leg. Hist. 1145. Emphasis added.

[16] 93 Cong. Rec. A2252; 2 Leg. Hist. 1523. Emphasis added.

for dealing effectively with industry-wide strikes. True, it does not go to the cause of such strikes . . . it deals with the effect—the industry-wide strike—and not with the cause, which is the concentration in labor unions of control over employees in great industries and in their associations with employers. The proper solution would be to place those relationships back on a realistic basis, in which the employees would really have a voice in determining the conditions under which they would work.

However, I think the bill will be an effective deterrent to industry-wide strikes . . ."[17]

The Senate ultimately passed S. 1126 as an amendment to H.R. 3020 which had been passed previously by the House.[18] The two versions of H.R. 3020 then went to conference. In conference, the House bill's ban on industry-wide bargaining was abandoned. The conference adopted substantially the Senate provisions, changing only the requirement that the strike be one that "affects substantially an entire industry" to the requirement that it be one that "affects an entire industry or a substantial part thereof".

It was recognized both in the House and the Senate that the conference bill dealt only with industry-wide strikes, and that the effect referred to in the "industry" provision was an effect upon the struck industry, not some other industry. In describing the changes made by the conference, the report of the House conferees, which was submitted to both the House and the Senate,[19] stated:

"Furthermore, under the conference agreement the authority of this section may be invoked not alone when

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[17] 93 Cong. Rec. 5012; 2 Leg. Hist. 1493.
[18] 93 Cong. Rec. 5117; 2 Leg. Hist. 1522.
[19] 92 Cong. Rec. 6436; 2 Leg. Hist. 1526

an entire industry is *involved* but where a substantial part of an entire industry is *involved.*"[20]

Comments from the floor, in both houses, confirm this statement that the conference bill was intended to be invoked only when an entire industry, or a substantial part of an entire industry, "is involved". Thus, Senator Taft in reporting to the Senate on the action of the conferees, declared that the provisions of the Senate bill dealing with national emergency strikes "have not been substantially changed."[21] Senator Pepper, on the other hand, in discussing the conference changes, declared that a considerable change had been made in these provisions. He said:

> "As I have just said, the Senate bill did not contain the words 'or a substantial part thereof', as applied to that provision. The Senate bill provided that *whenever an entire industry is threatened with a strike* or lockout, the President may appoint a board, which may lead to an application to the Attorney-General for an injunction, and to the impairment of the Norris-La-Guardia Act's provisions protecting the workers against government by injunction. But here, again, *the conference report is not satisfied with protecting against a strike in a case where an entire industry is affected,* but the conference report contains the words 'or a substantial part thereof.' "[22]

In the House, Congressman Hartley stated that the ban on industry-wide bargaining had been deleted. But, he stated, Section 206 contained provisions dealing with industry-wide strikes:

> "This section provides: That the President shall

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[20] House Conference Report No. 510, on H.R. 3020, 80th Cong., 1st Sess., p. 64; 1 Leg. Hist. 568. Emphasis added.

[21] 93 Cong. Rec. 6445; 2 Leg. Hist. 1543.

[22] 93 Cong. Rec. 6520; 2 Leg. Hist. 1598. Emphasis added.

whenever he considers that the national health and safety is imperiled by a strike *in* a nation-wide industry or substantial part thereof first appoint a board of inquiry which shall obtain the facts and shall report to him within a reasonable time as specified by the President."[23]

The senior Democratic member of the House Labor Committee, Congressman Lesinski, likewise recognized that the Senate national emergency strike provisions were a substitute for the House effort to prevent industry-wide strikes by restricting industry-wide bargaining. He declared:

"When it comes to industry-wide bargaining, however, the conference report is anything but frank. It states that provisions of the House bill, restricting industry-wide bargaining, were omitted from the conference bill. Nonetheless, there is embodied in the conference bill a provision stating that in any strike imperiling the national health or safety *in* all or a substantial part of an industry, where an injunction has been issued, there must be a company vote of the employees on the final settlement offer of each employer before the injunction is discharged."[24]

The conference bill was accepted by both Houses. It was vetoed by President Truman and ultimately passed over the veto. Immediately after the veto, and before the vote, Senator Taft made a speech on the veto message, which Senator Ball had printed in the Congressional Record. In the course of this speech, Senator Taft declared:

"Perhaps the most extraordinary provision of the message is the President's attack on the section permitting *an injunction against a nation-wide strike* affecting the national health and safety. It was through

[23] 93 Cong. Rec. 6383; 1 Leg. Hist. 882. Emphasis added.
[24] 93 Cong. Rec. 7345; 1 Leg. Hist. 910. Emphasis added.

such a procedure that he secured an injunction against John L. Lewis last fall. Last year when faced by a *nation-wide strike,* it was the President himself who recommended Government seizure and the drafting of all strikers into the United States Army. *Because Congress now gives him a carefully drafted authority to delay such a strike,* to attempt mediation and finally to conduct a strike vote when other remedies have been exhausted, he says the procedure will do more harm than good. He prefers to let the Smith-Connally Act expire on June 30 without any protection whatever for the people against *nation-wide* strikes."[25]

The course of the legislative history thus outlined makes clear that Congress was concerned only with strikes *in* an entire industry or substantial part thereof. This is not a matter of the casual use of language in impromptu speeches in the House and Senate. The conclusion that the bill was intended to cover only industry-wide strikes, or those substantially industry-wide, rests on carefully drawn committee reports in both houses, prepared speeches by the authors of both the Senate and the House bills, and the comments of every member of either the Senate or House who commented upon the scope of these provisions.

This limited scope of the national emergency provisions was confirmed when, in 1952, Congress faced the problem of single-plant strikes which interfered with the Korean war effort. In the legislative history which we have already described (*supra,* pp. 13-16), Congress made clear its understanding that the provisions do not reach the immobilization of a customer industry by a single-plant strike which involves less than a substantial part of the struck industry.[26] New

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[25] 93 Cong. Rec. A3043; 2 Leg. Hist. 1626 (Emphasis added).

[26] Senator Taft's analysis of the hypothetical case presented in the hearings (supra, pp. 14-15), is particularly revealing. The strike there was at a plant making a part "that went into every airplane." It is thus clear that the *entire* customer industry—the aircraft industry—

legislation to extend the emergency provisions to strikes in a "vital plant" was introduced, reported out of committee, but not enacted.

In the face of this clear Congressional intent to limit the national emergency provisions to strikes affecting all or a substantial part of the *struck* industry, coupled with Congress' general concern for preservation of the right to strike,[27] the extension permitted by the court below is a clear departure from the principles enunciated in *NLRB* v. *Fruit & Vegetable Packers, supra,* and *NLRB* v. *Drivers Local Union, supra,* and warrants review by this Court.

Second, even assuming that the effect of a strike may be measured in a customer industry, as the court below held, does not suffice to establish the Government's case. For it still remains for the Government to prove that there is an "industry," a substantial part of which is affected by the strike, and here is where the Government has employed the second interpretative device designed to emasculate the industry requirement. It has invented artificial "industries," where none existed before, within which to measure the effect of a strike. Born in the President's Executive Orders, these industries flourish in the Government's affidavits and pleadings during the lawsuit, only to vanish from existence once the injunction is granted. When Congress used the term "industry" in Section 208(a)(i), it had in mind broad, nationwide industries in the usual sense of that term —coal, steel, telephone, longshore, shipping, etc. (See the

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was affected. Nevertheless, Senator Taft explained that the national emergency provisions did not reach the situation, because they applied only to "national strikes." Likewise, the Committee Report recommending extension of the Act to strikes in a "vital plant" (supra, p. 16) recognized that the "industry" requirement related only to the struck industry. The proposed change, the Committee reported, "would permit application of the new procedures *to a unit smaller* than a 'substantial part' of an industry." (Emphasis added)

[27] See n. 7, *supra*

legislative history detailed *supra).* And, indeed, in all but three cases in which the emergency provisions have been invoked, a recognizable "industry" was alleged to be affected.[28] In three recent cases, however, the Government has begun a practice of alleging effects on exotic "industries", which change their shape to fit the lawsuit.

No clearer demonstration of this phenomenon can be found than by comparing these three recent invocations of the statute. In *United States v. International Assn. of Machinists (Republic Aviation)* (E.D.N.Y. Civil No. 62C662, unreported, 1962), the Government sued to enjoin a strike at a single plant manufacturing a particular tactical fighter plane. The "industry" alleged and found to be affected was the "tactical fighter production industry." In *United States v. General Electric Co.,* (S.D. Ohio, 1966, Civil No. 3350, unreported), the Government sued to enjoin a strike at the Evendale, Ohio plant of General Electric Company. That plant produces, *inter alia,* engines for the F-4, RF-4 and F-104 fighter planes. The "industry" alleged, and found, to be affected by the strike was the "military *jet* engine industry."[29] In the present case, the strike at Ko-

[28] Since 1947, the national emergency provisions have been invoked 26 times. The first 24 instances are described in National Emergency Disputes under the Labor Management Relations (Taft-Hartley) Act 1947-65 (U.S. Dept. of Labor, Bureau of Labor Statistics Bulletin No. 1482). The two most recent instances are *United States v. General Electric Co.* (S.D. Ohio, 1966, Civil No. 3350, unreported) and the instant case. 23 of the first 24 cases involved "industries" in the normal sense of that term. Six of these instances involved the longshore industry, five, the atomic energy industry, three, the coal industry, three, the maritime industry, two, the aircraft industry, and one each the steel, telephone, meatpacking, and copper industries. One of these earlier cases, as well as the two most recent, have involved product groupings which clearly are part of a broader "industry". They are discussed in the text.

[29] The Executive Order, but not the complaint, also alleged an effect upon a number of other unlikely "industries", including the "military electronics industry". Executive Order No. 11314.

komo was alleged to be cutting off materials needed by this same plant—the Evendale plant of General Electric—as well as two other plants at which helicopter engines are made. In order to squeeze the helicopter engines into the same "industry" with the jet engines, the Government, with the acquiescence of the courts below, simply redefined the industry as the "military *aircraft* engine industry." With similar facility, the Government can create in each case a new "industry" tailored to fit its litigation needs. If defined with sufficient imaginativeness, of course, there can always be an "industry" affected by any strike.

The Government's creation for this case—the "military aircraft engine industry"—was shown by petitioners' undisputed affidavits not to exist. It is merely a part of the "aircraft engine and engine parts" industry. (R. 48, 54, 86-87)

The same basic engines are adapted for use in both military and civilian aircraft. (R. 50-51) Engines for both military and civilian aircraft are manufactured in the same plants, by the same companies, and by the same employees. (R. 48-49). Indeed, the very engines made at the plants affected by the Kokomo strike have both military and civilian versions. (R. 50-51) Those who are in the aircraft field consider that there is one industry—the aircraft engine industry. (R. 48) And the Government's own *Standard Industrial Classification Manual* identifies the industry as "aircraft engines and engine parts", including engines and parts for both military and civilian aircraft. (R. 84-87) The Government introduced no countervailing evidence supporting its claim that there is a separate "military aircraft engine industry".

The reasons advanced by the court below for accepting the Government's creation are untenable. The court found, "from this record, especially when read with the common sense which should inform the judicial process as any other" that a great deal of capital, technological skill, and manpower go into the "building of aircraft engines designed for

use in military aircraft." (App. 43) This may well be so, but it does not prove that there is a separate *military* aircraft industry, when the very same engines are designed for use in *civilian* aircraft. In addition, the court below stated that petitioners' statistics showing that military engines constitute less than one-quarter of all engines produced "impress us as supporting a discernible division between military and civilian production." (App. 42-43, n. 1) We do not understand why. We doubt that figures showing that butter sold to the military constitutes less than one-quarter of all butter produced would "impress" a court "as supporting a discernible division" between military and civilian butter, such as to warrant recognition of a "military butter industry."

If "industry", as used in Section 208(a)(i), is to be interpreted as the Government here has done, and for the reasons assigned by the court below, the "industry" requirement will simply cease to have meaning, and the line which Congress intended to draw will vanish. This should not be permitted to occur without review by this Court.

Third, even permitting the Government to construct an artificial customer industry affected by the Kokomo strike was not sufficient to warrant issuance of the injunction. It remained for the Government to establish that the strike affected a "substantial part" of that "industry". On this point, there was a total failure of proof, as the court below virtually acknowledged. (App. 43). The court bridged this gap by two steps. First, it invoked "common knowledge" of "the magnitude of the effort this nation is being called upon to make in Southeast Asia", and drew therefrom the tenuous conclusion that the production of the particular engines affected by the strike "rests upon a resource commitment of a very substantial nature indeed." (App. 43). Second, it held that such a substantial commitment satisfies the statutory "industry" requirement, regardless of how large or small a part of the industry it con-

stitutes. (App. 43-44). Both steps in its reasoning process warrant review by this Court.

(a) The lower court's drawing of extra-record assumptions about the magnitude of the resource commitment involved in building the particular engines affected by this strike is directly contrary to this Court's holding in *Steel Industry*. This Court there held the Act constitutional, in the face of a claim that the courts are merely rubber stamps of the executive, precisely because the duty of fact-finding "upon the evidence adduced" rests with the courts:

> "The statute imposes upon the courts the duty of finding, *upon the evidence adduced*, whether a strike or lockout mets the *statutory conditions of breadth of involvement* and peril to the national health or safety . . .
>
> ". . . the availability of relief, in the common judicial form of an injunction, *depends on findings of fact, to be judicially made*." 361 U. S. at 41, 43. (Emphasis added).

When, as here, the Government elects to introduce no evidence whatsoever as to the magnitude of the resource commitment required to produce these engines, or as to the scope of the industry, it becomes a mockery of judicial fact-finding for the courts to indulge in guesswork of the type found in the opinion below. It may well be that the engines affected do *not* constitute a substantial resource commitment, let alone a substantial part of the industry. The Government has not said that they do, and we assume it would have said so if it were the fact. When the facts support its contention of substantiality in these cases, the Government has been quick to introduce voluminous evidence to that effect. See, e.g. *Steel Industry, supra; United States* v. *National Maritime Union*, 196 F. Supp. 374 (S.D.N.Y. 1961); *United States* v. *International Longshoremen's Assn*, 57 LRRM 2599 (S.D.N.Y. 1964).

(b) But even if the court's guesswork were proper, the result achieved is not. For the issue under Section 208(a)(i) is *not* whether the engines affected involved a substantial commitment of resources, but whether they constituted a substantial part of an entire industry. On this point, the court below did not even venture a guess. Nor did the district court, which also side-stepped the issue by finding that the strike had "a *substantial effect on* the industry of production of military aircraft engines." (App. 38)

As we have shown, the emergency provisions were passed in response to fears regarding industry-wide strikes, two of which had just been experienced in the coal and telephone industries. The House's proposed solution was to abolish industry-wide bargaining. In the Senate, this was regarded as too bold a measure to deal with a more easily remediable problem. Since the problem with industry-wide strikes was their potential effect on the national health and safety, Senator Taft proposed that they be enjoinable when they imperil the national health and safety. Accordingly, the Senate bill made enjoinable strikes affecting "an entire industry" which imperil the national health and safety. In Conference, the House conferees acquiesced in the Senate's approach to dealing with industry-wide strikes. The only change was to add the words "or a substantial part thereof." While there is no express explanation of the intended meaning of this addition, it is clear from the context that it was a safeguard to prevent nonapplicability where—as in the 1959 steel strike—only 85% of the industry, less than "the entire industry," was affected. That Congress intended the "substantial part" to be a proportion of the "entire industry," and not, as found by the court below, any substantial volume of expenditures regardless how large or small the proportion of the industry, is clear from the Conference Report which explained:

> "[U]nder the conference agreement the authority of this section may be invoked not alone when an entire

industry is involved but where a *substantial part of an entire industry* is involved." House Conference Report No. 510, 80th Cong., 1st Sess., p. 64.

The "guess" of the court below—that there are substantial expenditures on the particular military aircraft engines affected—does not, we believe, meet the Congressional requirement of a finding that the strike affected "a substantial part of an entire industry."

At the very least, if such a reading is henceforth to be applied to this provision, thus interpreting it out of existence, that result should come only after review and decision by this Court.

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this petition for certiorari be accorded expedited consideration and that it be granted; that this petition be considered our brief on the merits if certiorari is granted; and that, on the merits, the decision below be reversed and the injunction vacated.

Respectfully submitted,

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APPENDIX

OPINION OF THE DISTRICT COURT

* * * *

THE COURT: Are all parties here? Gentlemen, if you do not mind, the Court has a bad cold and the flu and I have a preliminary statement that I would like to read, and I will have Mr. Wilson read it, if you do not mind, for the record.

PRELIMINARY STATEMENT

"The Government of the United States petitions the Court for a Preliminary Injunction against the Union Carbide Corporation and the United Steelworkers of America, AFL-CIO, Local 2958, United Steelworkers of America, AFL-CIO, located in Kokomo, Indiana, where the Haynes Stellite Division of the Union Carbide Corporation are manufacturers of a special high temperature special purpose metal alloy which is used to fabricate combustion liners used on certain jet planes and in blades and vanes which are critical production components of military helicopters. The alloy is known as "Hastelloy X."

"Plaintiff prays for an injunction in accordance with the provisions of the Labor-Management Relations Act, Section 178, to restrain personnel of Haynes Stellite Division of Union Carbide Corporation at Kokomo, Indiana, from continuing or taking part in any strike or lockout at the plaintiff's plant, and the Union from encouraging, ordering or taking part in any strike at said plant.

"This particular matter presents two fundamental questions as set forth in the statute: whether or not the strike or lockout (1) affects an entire industry or a sub-

stantial part thereof engaged in trade, commerce, transportation, transmission or communication among the several states or with foreign nations or engaged in the production of goods for commerce; and (2) if permitted to occur or continue, will imperil the national welfare or safety.

"The Court, after hearing oral argument of counsel and having opportunity to review the pleadings, affidavits and points and authorities submitted herein, finds:

"That the strike at the Kokomo plant raises the issue as to what is an 'industry' under the provisions of Section 178(a)(1) of the Labor-Management Relations Act.

"Under Section 142 of that Act the term 'industry affecting commerce' means 'any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce, or tend to burden or obstruct commerce, or the free flow of commerce.'

"The Court finds that the strike at the Kokomo plant does have a substantial effect on the industry of production of military aircraft engines and therefore is encompassed within the Act.

"The Court has no difficulty with the second question presented—that is affecting the safety of the country—in view of the evidence submitted.

"The Court therefore signs the Order submitted by the plaintiff and the Findings of Fact and Conclusions of Law submitted by plaintiff, the United States of America.

"That is to say, the Court grants the Preliminary Injunction."

JUDGMENT OF THE COURT OF APPEALS

[Caption Omitted]

Before: Fahy, McGowan, and Leventhal, Circuit Judges.

JUDGMENT

On consideration of the record on appeal from the United States District Court for the District of Columbia, and the pleadings filed by the parties herein, and counsel for the parties, at the time of hearing on appellants' motion for stay, having stipulated that this case may be treated as submitted for final decision on the merits and pleadings now on file herein in this cause, it is, for the reasons set forth in the accompanying opinion,

ORDERED and ADJUDGED by this Court that the order of the District Court appealed from in this cause be, and it is hereby affirmed, and it is

FURTHER ORDERED and ADJUDGED by this Court that the order of this Court entered December 22, 1966, granting appellants' motion for stay shall remain in effect until 5 P.M. December 23, 1966.

Per Curiam.

OPINION OF THE COURT OF APPEALS

Per Curiam: The District Court, on December 21, 1966, issued a preliminary injunction, under the National Emergencies provisions of the Labor Management Relations Act, 29 U.S.C. §§ 176-180, against the continuation of a strike by the Steelworkers at a Union Carbide plant in Kokomo, Indiana. The following day the matter came on before us on the union's motion for a stay pending appeal. In the course of the argument of that motion, all parties stipulated that the case should be regarded as submitted to us on the merits. In the light of this development, we stayed the injunction

until 5:00 P.M. on December 23. For the reasons set forth below in necessarily brief compass, and pursuant to a purpose to do so communicated by us to the parties on the afternoon of December 22, we affirm the District Court and decline to extend our stay beyond the originally appointed time.

Eleven Union Carbide plants in all have been struck, but injunctive relief has been sought by the United States in respect of only one. This is the so-called Stellite Division, which produces a high temperature metal alloy used by aircraft engine manufacturers. As contemplated by the Act, the President convened a board of inquiry and, upon receipt of its findings, directed the Attorney General to seek an injunction ending the strike for 80 days. The matter was heard in the District Court on affidavits, and upon oral and written representations, submitted by the parties. The injunction issued upon findings of fact and conclusions of law formulated by the District Court after this hearing.

The central finding is that the strike, if permitted to continue, "will affect a substantial part of the military aircraft engine industry" engaged, within the meaning of the Act, in interstate and foreign commerce, or in the production of goods for such commerce. It is further found that the strike will affect the National Safety in that:

(1.) A manufacturer supplied by the Stellite Division is the sole producer of engines and spare parts for military aircraft known as the F-4, the RF-4, and the F-104. All these aircraft are variously being used by the Navy and Air Force in combat and reconnaissance operations in Southeast Asia. The metal alloy in question, of which the Stellite Division is the major producer, is required in the fabrication of combustion liners which enable the engines to perform under the extremely high temperatures generated by the burning of jet engine fuel. Since the only other producer of this alloy under license from the Stellite Division is supplying other priority requirements, there is no other source available to

enable the manufacturer to meet its delivery schedules, and existing stocks will shortly be exhausted, all to the detriment of our national safety.

(2) The Stellite Division also produces turbine blades essential in the engines which power the helicopters known as the CH-53, the CH-46, and the SH3D. The first two of these classes are used by the Marine Corps in combat in Southeast Asia, and the last is used in the Navy's antisubmarine warfare programs. There is no alternate source of the castings for these blades which can maintain the existing production schedules of the manufacturer making these engines.

(3) The Stellite Division supplies certain first and second stage turbine blades and vanes for the engines powering the UH-1 and CH-47 helicopters. These aircraft are used by the Army in Southeast Asia for combat, as well as for the transportation of troops, supplies, and artillery, and for fire support of ground troops. The strike has resulted in inadequate stocks of blades and vanes to permit the rebuilding of old engines to replace worn and combat-damaged engines in Southeast Asia, and to maintain production schedules of new engines.

It is further found that, by reason of the foregoing circumstances, the strike will result in an irretrievable loss of time in the supply of weapons systems essential to the national defense and security of the United States, with particular reference to current combat operations in Southeast Asia. There are no other sources from which sufficient quantities of the necessary materials and parts can be obtained in time to maintain levels of aircraft and helicopter engines requisite to meet adequately our military necessities, all to the imperilment of our national safety, and with irreparable damage to the United States for which there is no adequate remedy at law.

Although the union does not accept these findings, the principal thrust of its argument to us was, by its own char-

acterization, not directed towards overturning them. It asserts, rather, that it is not enough for a successful invocation of Taft-Hartley merely to establish that the ending of the strike would relieve pressures antipathetical to our national safety. There must, in addition, be a showing that the strike, in the language of the Act, "affects an entire industry or a substantial part thereof"; and that the District Court's finding to this effect is, on this record, conclusionary at best.

We do not agree. To the extent that the union's position derives from a contention that Congress conceived of the emergency provisions of Taft-Hartley as confined to the ending of work stoppages in the industry in which the striking employees are immediately engaged (in this instance, the metal alloys industry as distinct from the manufacture of military aircraft engines), it is disposed of to our satisfaction by *United States* v. *United Steelworkers (American Locomotive Company)*, 202 F.2d 134 (2nd Cir. 1953). In any event, the President did not direct the invocation of Taft-Hartley in respect of the metal alloys industry. His problem was with the effect of the strike upon the military aircraft engine industry; and, in our view, any strike which affects that industry, or a substantial part thereof, falls within the reach of the Congressional concern which gave rise to the emergency provisions of Taft-Hartley. Thus, the availability of those provisions in this case turns upon whether there is in fact an industry identifiable as the military aircraft engine industry; and, if there is, whether that industry has, either in its entirety or in substantial part, been affected by this strike to the jeopardy of our national safety.

The first part of this inquiry presents minimal difficulties.[1]

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[1] The union's affidavits assert that there is only one aircraft engine industry, making engines for both military and civilian uses. But these same affidavits indicate that some 23% of all engines produced are for military purposes, and that 29% of all the employees of this allegedly single industry worked on military engines, producing 18% of the total dollar volume of shipments. It is also conceded that the strike in issue

That there is in this country a tangible commitment of extensive resources of capital, technological skill, and manpower to the building of aircraft engines designed for use in military aircraft is evident from this record, especially when read with the common sense which should inform the judicial process as any other. The President, in using this term, was not devising an imaginary construct, nor was the District Court.

In respect of the second branch of the inquiry, the statute does not embody an all-or-nothing approach. The District Court did not have to find that the "entire" military aircraft engine industry was affected, but only that a significant segment of it was. This record arguably does not admit of an identification in concrete terms of the total resources of this country employed in the manufacture of military aircraft engines. But, in the light of what is common knowledge of the magnitude of the effort this nation is being called upon to make in Southeast Asia, it is impossible to read what is in this record of the types and functions of the aircraft involved without concluding that their availability in adequate numbers to every branch of the armed services rests upon a resource commitment of a very substantial nature indeed. Our industrial might—in aircraft engine manufacture as elsewhere—is great, but it is not unlimited. We would overestimate it sadly if we were to conclude, on this record, that an effort of very substantial proportions is not required of

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may affect as many as 16,500 workers, representing 13% of the total industry employees. These figures impress us as supporting a discernible division between military and civilian production. Further, the union's affidavits indicate that there is no dispute that the alloy made by the Stellite Division is a component of the engines powering the particular types of aircraft identified in the District Court's findings. There is some effort by the union to assert that other sources of the alloy can be found, but we do not think there is any serious showing that these could meet within any reasonable time the crisis which has prompted the President to act.

the military engine aircraft industry to keep these planes and helicopters moving steadily to the area of critical need.

It may be, as the union urges, that there are means other than Taft-Hartley by which this strike could be ended. But the question now is whether Congress intended the limited restrictions of Taft-Hartley upon the right to strike to be available to the President under the circumstances which have—rationally, we think—been found to obtain here. We do not find the District Court's answer to be wanting in either factual or legal foundation. Its judgment is accordingly

Affirmed.